For the reasons that I had given, I had accordingly dismissed the defendants' appeal with costs.

MULPHA TRADING SDN. BHD. & ANOR.

v.

JACK LIM TING CHAI & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[ORIGINATING MOTION NO. R2-25-100-91]
28 JUNE 1993

ADMINISTRATIVE LAW: Definition of "workman" - Industrial Relations Act 1967, s. 2 - Respondent dismissed by applicants - Respondent holding post of Executive Director of first applicant - Industrial Court ruled respondent a "workman" - Whether finding of Industrial Court proper - Whether a company director can be a "workman".

WORDS AND PHRASES: "workman".

Mulpha International Berhad, the second applicant in this case, was formerly known as Mulpha International Trading Corporation Berhad (MITCB). MITCB was a holding company carrying on business through its subsidiaries. One of these subsidiaries was the first applicant, Mulpha Trading Sdn. Bhd. (Mulpha Trading). The first respondent was employed by MITCB as an Executive but was later made to serve Mulpha Trading, first as General Manager and later as its Executive Director. While serving in the latter post the first respondent was dismissed by the applicants. The Minister of Labour made a reference to the Industrial Court concerning the dismissal and the preliminary question that arose before the said Court was whether or not the first respondent was a "workman" as defined by s. 2 of the Industrial Relations Act 1967. The Industrial Court ruled that the first respondent was a "workman" within the definition of that section. The applicants applied to the High Court for the following orders:

(1) An order of *Certiorari* to quash the decision of the Industrial Court; and
(2) An order of *Prohibition* prohibiting the Industrial Court from proceeding further.

Held:

[1] It is not the law that a person who is employed as a director of a company can never be a "workman" under the Act.Whether or not he is a "workman" depends upon the nature of his functions and responsibility in the company.

A person who is employed as a director in a company is a "workman" within the definition of s. 2 of the Act if he is not the very brain of the company or its directing mind determining and formulating the company's policies.

[2] The Industrial Court should have examined the claimant's functions and responsibility as a director of Mulpha Trading and not his function and responsibility as an Executive in MITCB in order to determine whether or not he could be considered as a "workman" under the Act.

[3] The finding of the Industrial Court on the issue is clearly erroneous as the Court did not at all examine the claimant's function and responsibility as the Executive Director of Mulpha Trading. There is sufficient evidence that so far as Mulpha Trading is concerned, the claimant, as its Executive Director, was at the material time its very brain or directing mind. Thus, he could not come within the definition of "workman" in s. 2 of the Act.

[Application allowed].

Case referred to:
Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor. *[1985] 2 MLJ 297* ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 20(3)

For the applicants - N. Sivabalah; M/s. Shearn, Delamore & Co.
For the respondent - K.P. Gengadharan; M/s. Genga, Maha, Wong & Co.

JUDGMENT

Wan Adnan bin Ismail J:
This is an application for an order of *Certiorari* to quash the decision of the Industrial Court in Award No. 194/1991 dated 29 June 1991 and for an order of *Prohibition* prohibiting the Industrial Court from proceeding further in the Industrial Court Case No. 3/4-179/88.

The case before the Industrial Court was a reference by the Minister of Labour (now Minister of Human Resources) under s. 20(3) of the Industrial Relations Act 1967 (the Act) concerning the dismissal of Jack Lim Ting Chai (the claimant) by Mulpha Trading Sdn Bhd (Mulpha Trading) and Mulpha International Trading Corporation Bhd (MITCB) with effect from 2 April 1987. At the outset of the hearing a preliminary objection was raised by the learned Counsel for Mulpha Trading and MITCB that the claimant, being the Executive Director of Mulpha Trading at the material time, was not a "workman" within the definition in s. 2 of the Act. There was a hearing on the objection and at the end of it the Court ruled that the claimant came within the definition of "workman" under the Act. Hence this application.

First I like to say that, in my understanding, it is not the law that a person who is employed as a director of a company can never be a "workman" under the Act. Whether or not he is a "workman" depends upon the nature of his functions and responsibility in the company.

In *Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor.* [1985] 2 MLJ 297 Salleh Abbas LP (as he then was) said:

> In my view the expression "as a workman" indicates the intention of the legislature in that in construing the term "workman", the purpose for which a person is employed must be taken into consideration. In other words, the function and responsibility of an employee are the criterion and must be looked into.

He went on further to say:

> Under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy.

Thus a person who is employed as a director in a company is a "workman" within the definition in s. 2 of the Act if he is not the very brain of the company or its directing mind determining and formulating the company's policies. Therefore the fact that a person is employed as a director of a company will not *ipso facto* take him out of the definition "workman" under the Act. His function and responsibility as a director will determine whether or not he can be regarded as a workman.

By the Service Agreement executed on 1 December 1979 the claimant was appointed as an Executive in MITCB. Clause 1(a) of the agreement provides as follows:

> 1(a) The Executive shall subject to the terms of this agreement serve GB as an Executive and in such capacity shall perform such duties and exercise such powers as from time to time may be assigned to or vested in him by or with the authority of the Chief

> Executive of GB (hereinafter called "the Chief Executive"). The said duties and powers may include the conduct or management of the respective businesses of any company of the GB Group or part thereof wheresoever situate to be exercised through the management structure of the GB Group as it exists from time to time ...

Clause 2 provides as follows:

> 2. The Executive shall at the request of the Chief Executive:
>
> (a) accept appointment as a Director of any company of the GB Group and of any other company with which the GB Group has relations in the course of its business;
>
> (b) resign any such Directorship.

With effect from 1 January 1980 the claimant was appointed the General Manager of Guthrie Sendirian Berhad (now known as Mulpha Trading Sdn Bhd). This appointment carried monthly salary of RM5,000. With effect from 1. January 1985 he was promoted to the position of Executive Director of Mulpha Trading. His monthly salary was increased to RM10,000.

At all material times Mulpha Trading was a wholly owned subsidiary of MITCB.

As an Executive Director in Mulpha Trading the claimant was its Chief Executive Officer. He was answerable to the Executive Director of MITCB. He was responsible for the day to day administration of the company. The claimant also determined the terms and conditions for the employment of the company's staff. Recruitment of staff was also subject to his approval. He had signed contracts on behalf of the company. He conveyed the Board's of Directors decision to pay annual bonus to the staff. He could give salary adjustment to the staff. The claimant himself in evidence admitted that he was the highest ranking officer in Mulpha Trading. He could commit purchase orders of up to RM500,000 without referring to the Executive Director of MITCB. However he was subject to the directions from the Board.

There is no dispute that at the material time the claimant was the Executive Director of Mulpha Trading. In fact he was its Chief Executive Officer. Of course, his powers are not without limitations. He had to take instructions from the Board and the Executive Director of MITCB which is the parent company of Mulpha Trading. Even the powers of an Executive Chairman or a Managing Director of a company are subject to such limitations and restrictions as are imposed by the company's Board of Directors. There is sufficient evidence that so far as Mulpha Trading is concerned the claimant as its Executive Director was at the material time its very brain or directing mind. Thus, he could not come within the definition of "workman" in s. 2 of the Act.

The Industrial Court did not at all examine the claimant's function and responsibility as the Executive Director of Mulpha Trading. Instead the Court only considered his function as an Executive of MITCB. The Court asked this question:

> Therefore, was the claimant in this case, the very brain or directing mind of MITCB, the employer or company which dismissed him. There is evidence by the company's only witness - CO-W1, who said during cross examination:
>
> > The claimant was not a Director of MITCB or General Manager of MITCB. He was not the Chief Executive of MITCB. As far as MITCB is concerned he was an Executive or employee of MITCB. As far as MITCB is concerned, he has no powers of running MITCB.

Under the service agreement with MITCB the claimant was under obligation to serve MITCB in any capacity from time to time he was assigned to in any subsidiary including the position as a director. He was directed to Mulpha Trading as the Executive Director to manage the company. It was a promotion for him. He first joined as an Executive, then he became a General Manager and finally an Executive Director.

It was the contention of Mr. P. Gengadharan the learned Counsel for the claimant that the claimant was employed by MITCB; he was at the material time only an executive in MITCB and therefore a workman under the Act. The fact that he was an Executive Director in Mulpha Trading was immaterial. On the other hand Mr. N. Sivabalah the learned Counsel for the two companies contended that the claimant was a Director of Mulpha Trading which was a subsidiary of MITCB. He was made a Director of the company. It was a position made in accordance with the service agreement. The fact that he was not a Director of MITCB was irrelevant. The

important fact was that the claimant was the Executive Director of a subsidiary of MITCB. He contended that the Industrial Court should have asked:

> Was the claimant in this case the very brain or directing mind of Mulpha Trading?

I agree with Mr. Sivabalah that the Industrial Court should have examined the claimant's function and responsibility as a Director in Mulpha Trading and not his function and responsibility as an Executive in MITCB in order to determine whether or not he could be considered as a "workman" under the Act. Mulpha Trading was a subsidiary of MITCB. He joined the MITCB group as an Executive and rose up to become an Executive Director of one of the companies in the group. To suggest that he must be considered as still being an executive of MITCB at the material time is to my mind repugnant to good sense. It is irrelevant that he was not a Director of MITCB itself. He was an Executive Director of one of its subsidiaries. MITCB was a holding company carrying on business through its subsidiaries.

I find the finding of the Industrial Court on the issue clearly erroneous. The Industrial Court had committed an error going into jurisdiction. I therefore allowed the application with costs.

NAM HO TRAVEL SERVICE (S) PTE. LTD.

v.

PROGRESSIVE INSURANCE SDN. BHD.

HIGH COURT, JOHOR BAHRU
DATO' ALAUDDIN BIN DATO' MOHD. SHERIFF J.
[CIVIL SUIT NO. 25-79-85]
5 MAY 1993

TORT: Road Accident - Claim for special damages - Principle of damages in tort - Driver insured by defendant - Evidence of negligence not challenged by defendant - Whether defendant fully liable - Plaintiff incorporated in Singapore - Exchange of currency - Proper date for determining value of currency.

The plaintiff in this case claimed from the defendant special damages for the losses it had suffered as a result of an accident between the plaintiff's tour bus and a car whose driver was insured by the defendant. The accident occured on 24 October 1982 at 34 $^1/_2$ mile stone Johor Bahru - Ayer Hitam road. At the hearing, evidence was adduced by the plaintiff which, if not refuted, would conclusively establish the negligence of the car driver but the defendant chose not to challenge this evidence.The plaintiff was a tour bus company incorporated in Singapore having its base of operation in that Republic. The issues before the court were centred on the following questions:

1. Apportionment of liability.
2. Compensation for loss of use of the tour bus.
3. Proper date for determining the currency exchange rate.

Held:

[1] The motorcar had not only encroached into the plaintiff's right of way before the accident but had also been driven at exessive speed. On the other hand the evidence showed that the driver of the motorbus had taken every reasonable step as a prudent driver to avoid the collision.The defendant must therefore be held 100% liable for the accident.

[2] It is perfectly reasonable for a tour bus company to operate on a basis of $^1/_3$ operation cost and having regard to the collection made by the plaintiff from the tours in October 1982, the plaintiff's claim for the loss of use of the bus at S$800 per day is not at all unreasonable.